Supreme Court, U.S.
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No. 02-258

IN THE

Supreme Court of the United States

SUSAN JINKS,

Petitioner,

v.

RICHLAND COUNTY,

Respondent.

On Writ of Certiorari to the Supreme Court of South Carolina

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, NATIONAL LEAGUE OF CITIES, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether Congress has power under Article III to require a state court to entertain a state law claim that is barred by the State's statute of limitations when the claim is first brought in federal district court under the supplemental jurisdiction statute, 28 U.S.C. § 1367.

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INTEREST OF THE *AMICI CURAIE*

Amici are organizations whose members include state, county, and municipal governments and officials throughout the United States.[1] *Amici* have a compelling interest in legal issues that affect state and local governments.

This case implicates three core attributes of state sovereignty. The first is a State's power to create a statutory right and define the parameters for enforcement of that right. The second is a State's authority to determine whether local governments are entitled to the protections of sovereign immunity with respect to state-created causes of action. The third is a State's authority to prescribe the rules for litigation in its courts, including the power to regulate the courts' workload.

The Supremacy Clause requires state courts to hear federal causes of action within their jurisdiction and apply federal law procedures applicable to the federal statutory scheme. The statute at issue here, 28 U.S.C. § 1367(d), however, goes much further. It orders a state court to hear a state-created cause of action notwithstanding a fundamental limitation that the State has imposed on the enforcement of the right. Such preemption is not a valid exercise of Congress's Article III powers.

Because of the importance of this issue to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.

SUMMARY OF ARGUMENT

1. Article III does not grant Congress the power to override a State's limitations policy with respect to a state-created cause of action litigated in the State's courts. This Court has

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[1] The parties have consented to the filing of this *amicus* brief and their letters of consent filed with the Clerk. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than *amici* or their members, made a monetary contribution to the preparation or submission of this brief.

long recognized that "[t]he state courts are not, in any sense of word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this [C]ourt." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807) (Marshall, C.J.). Rather, state courts are creations of separate and independent sovereigns and derive their authority from state constitutions and state law, and not Article III.

This fundamental premise of the constitutional structure precludes any assertion by Congress of Article III power either to rewrite the substantive rules with respect to state-created causes of action or to regulate the rules of procedure in state courts. As the Court explained in *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407-08 (1871), "[i]n their laws, and mode of enforcement, neither [sovereign] is responsible to the other. How their respective laws shall be . . . carried into execution; and in what tribunals . . . are matters subject to their own control, and in the regulation of which neither can interfere with the other."

2. While Congress has enacted several statutes tolling state statutes of limitations, these provisions have typically been enacted pursuant to expressly delegated Article I powers. Section 1367(d), by contrast, is an Article III enactment that petitioner justifies as analogous to a federal court's authority to issue orders as "a necessary aid to jurisdiction." Pet. Br. 21. Section 1367(d) is, however, a considerable expansion beyond the permissible scope of such an order, which the Court has explained is "something similar to the concept of injunctions to 'protect or effectuate' judgments." *See, e.g., Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 295 (1970). Indeed, section 1367(d) does not even apply until a federal court dismisses the claim and declines jurisdiction. Such a dismissal is not a judgment on the merits. Section 1367(d) therefore cannot be properly viewed as a necessary aid to federal court jurisdiction.

3. Several lines of authority confirm the core proposition that Congress does not have power under Article III to override a State's limitation policy with respect to state-created causes of action. The Court's Full Faith and Credit Clause jurisprudence has long recognized "that laws limiting the time of bringing suit, constitute a part of the lex fori . . . they are laws for administering justice; one of the most sacred and important of sovereign rights and duties; and a restriction which must materially affect both legislative and judicial independence." *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet. 457, 466 (1831). The Court has thus recognized the power of a State to control access to its courts by applying its own statutes of limitations "even when the substance of the claim must be governed by another State's law." *Sun Oil Co. v. Wortman*, 486 U.S. 717, 723 (1988).

Moreover, the *Erie* line of cases establishes limits on Article III power that preclude the application of section 1367(d) in this case. As the Court recognized in *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 112 (1945), "[w]henever [a State's limitations] law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a federal court."

The courts are one of the principal institutions through which the State's legislative and enforcement priorities are carried out. Statutes of limitations are an essential means by which a State controls the workload of its courts and prioritizes the enforcement of state-created rights. Petitioner thus errs in asserting that notice to defendants is the only legitimate purpose of a statute of limitations and "[t]olling works no prejudice to State interests." Pet. Br. 41.

Petitioner could have easily filed a protective action in state court within the limitations period of the South Carolina Tort Claims Act. This simple step would have preserved

petitioner's state law claims and shown due respect for South Carolina's sovereign interest in controlling the litigation of state-created rights in its own courts.

Nor is there any merit to petitioner's contention that South Carolina's non-tolling policy discriminates against a federal right. Rather, the State's policy is a neutral rule, which applies whether a litigant pursues a claim in the courts of another State, a foreign country, or the United States. A state court does not violate the Supremacy Clause when it applies a forum-neutral tolling rule to a state-created right litigated in state court.

ARGUMENT

SECTION 1367(d) IS AN UNCONSTITUTIONAL ENCROACHMENT ON STATE SOVEREIGNTY

For nearly two centuries it has been established that "'[t]he period sufficient to constitute a bar to the litigation of sta[l]e demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience.'" *Sun Oil Co. v. Wortman*, 486 U.S. 717, 726 (1988) (quoting 2 James Kent, *Commentaries on American Law* 462-63 (2d ed. 1832)). As the Court long ago explained, "the time after which suits or actions shall be barred, has been from a remote antiquity, fixed by every [government], in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction." *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 327 (1839).

The Court has accordingly recognized that "[s]tatutes of limitations are not simply technicalities." *Board of Regents v. Tomanio*, 446 U.S. 478, 487 (1980). Moreover, "[i]n virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975).

These propositions carry even greater force where, as here, "a statute creates a right of action that did not exist at common law and does not exist in the absence of the statute." 51 Am. Jur. 2d *Limitation of Actions* § 280, at 629 (2000). In such circumstances, "the time limit described in such a statute is a limitation upon the right itself," and "the limitation prescribed in the statute, within which such an action must be commenced, is a condition imposed upon the exercise of the right of action granted, and is not extended by the pendency and dismissal of a former action." *Id.* at 629-30. *Cf. Raygor v. Regents of Univ. of Minn.*, 534 U.S. 533, 542 (2002) ("a limitations period may be 'a central condition' of the sovereign's waiver of immunity") (quoting *United States v. Mottaz*, 476 U.S. 834, 843 (1986)).

Like all States, South Carolina has enacted a comprehensive set of statutes governing the timeliness of state-created causes of action. *See* S.C. Code Ann. §§ 15-3-20 *et seq.* Unlike some States, South Carolina has not enacted a "savings" or "renewal statute," and thus a claim brought in another sovereign's courts does not toll the State's statutes of limitations. *See Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 431-32 & n.9 (1965); *see also generally* S.C. Code Ann. Ch. 3. This rule applies whether a suit is brought in the courts of another State, a foreign country, or the United States.

Most significantly, South Carolina has weighed the competing interests of those injured by tortious governmental conduct and "the potential problems and hardships each governmental entity may face being subjected to unlimited and unqualified liability for its actions." South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-20(a). It has thus exercised its sovereign authority to extend sovereign immunity to its political subdivisions such as respondent. *See* South Carolina Tort Claims Act, codified at S.C. Code Ann. § 15-78-10 *et seq.*; *see also id.* at § 15-78-20(a). As section 15-78-20(a) states, it is South Carolina's "public policy . . .

that the State, and its political subdivisions, *are only liable for torts within the limitations of this chapter and in accordance with the principles established herein*." *Id.* (emphasis added).

The intent of the Act is "to grant the State, its political subdivisions, and employees, while acting within the scope of official duty, immunity from liability and suit for any tort except as waived by this [statute]." *Id.* § 15-78-20(b). The statute thus "provide[s] for liability on the part of the State [and] its political subdivisions . . . only to the extent provided herein," and provides "the exclusive civil remedy . . . for any tort committed by a governmental entity, its employees, or its agents," except for a narrow category of torts not relevant here. *Id.*

The Act imposes several limitations on suits for governmental torts, the most important for present purposes being that "any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered[.]" *Id.* § 15-78-110; *see also id.* at § 15-78-100. The Act also limits the applicability of South Carolina's general tolling provisions in tort actions against governmental entities. *See id.* § 15-3-40 (tolling if plaintiff is under 18 or mentally incompetent); *see also id.* §§ 15-78-100; 15-78-110.

Petitioner seeks to override these important state policies by invoking 28 U.S.C. § 1367(d) to toll her state-created claim because she brought it first in federal court. As explained below, section 1367(d) exceeds the bounds of Article III power and thus cannot save her state-created cause of action. The judgment of the South Carolina Supreme Court should therefore be affirmed.

A. Congress Does Not Have A General Supervisory Authority Over The Tolling Rules Applicable To State-Created Causes Of Action Litigated In State Courts

1. "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (quoting The Federalist No. 39, at 245 (J. Madison)).

The Constitution's preservation to the States of a core of sovereignty is manifested in several ways. It is displayed implicitly by the grant to Congress of the limited, enumerated powers found in Article I, Section 8. *See id.* at 919; *see also Gregory*, 501 U.S. at 457 (1991) ("The Constitution created a Federal Government of limited powers."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). It is made express by the text of the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. As James Madison wrote:

> The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

The Federalist No. 45, at 292-93 (Madison) (C. Rossiter ed., 1961), *quoted in Gregory*, 501 U.S. at 458.

Where the Constitution does grant power to the federal government, that power is limited in a critical respect vis-à-vis the States. The Court observed in *New York v. United States*, 505 U.S. 144, 166 (1992), that "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." *See also Printz*, 521 U.S. at 919-20 ("the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and Federal Governments would exercise concurrent authority over the people"). As the Court has explained:

> The great innovation of this design was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other"—"a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."

Printz, 521 U.S. at 920 (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)). As Madison further wrote: "[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere." The Federalist No. 39, at 245 (Madison) (Isaac Kramnick ed., 1987).

The structure of the Constitution "thus contemplates that a State's government will represent and remain accountable to its own citizens." *Printz*, 521 U.S. at 920. South Carolina's enactment of its Tort Claims Act is a paradigmatic example of a State "represent[ing] and remain[ing] accountable to its own citizens," *id.*, by providing a legal remedy for tortious conduct of government employees but setting the parameters for obtaining relief.

2. Article I, Section 8, of the Constitution sets forth Congress's powers. Clause 17 confers on Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia, and "to exercise like Authority over all Places purchased . . . for the Erection of" military and other installations, thus granting Congress police power over these areas. U.S. Const. Art. I, § 8, cl. 17. The Constitution otherwise "withhold[s] from Congress a plenary police power that would authorize enactment of every type of legislation." *United States v. Lopez*, 514 U.S. 549, 566 (1995) (citing Art. I, § 8); *see also United States v. Morrison*, 529 U.S. 598, 618 n.8 (2000) ("[T]he principle that the Constitution created a Federal Government of limited powers, while reserving a generalized police power to the States, is deeply ingrained in our constitutional history.") (internal quotations and citations omitted).

The Court has further held that Congress has implied "power to make all laws necessary and proper for carrying into execution not only all the powers previously specified, but also all other powers vested by the Constitution in the government of the United States, or in any department . . . thereof." *Tennessee v. Davis*, 100 U.S. (10 Otto) 257, 263 (1880). But the scope of Congress' power with respect to the federal judicial power is not unlimited. Under Article III, Congress indisputably has power to "ordain and establish" federal courts inferior to this Court. U.S. Const. Art. III, §1. This includes the power to regulate the jurisdiction of, and the procedure to be followed in, the federal courts. *See Sibbach v. Wilson*, 312 U.S. 1 (1941); *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 656 (1835).

Article III does not, however, grant power to Congress or the federal courts either to superintend the rules of procedure in the state courts or to rewrite the substantive rules governing state-created causes of action. A long line of authority rejects the notion that state courts are inferior courts under Article III and "that Congress could confer jurisdiction on the

State courts." *Claflin v. Houseman*, 93 U.S. (3 Otto) 130, 141 (1876); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 27 (1820) (opinion of Washington, J.) ("I hold it to be perfectly clear, that Congress cannot confer jurisdiction upon any Courts, but such as exist under the constitution and laws of the United States. . . ."); *id.* at 67 (Story, J., dissenting) ("There is no pretence to say, that Congress can compel a State Court Martial to convene and sit in judgment on [a federal criminal] offense."). *See also* 1 James Kent, *Commentaries on American Law* 377 (New York, O. Halstead 1826) ("The doctrine seems to be admitted, that congress cannot compel a state court to entertain jurisdiction in any case.").

While a state court is required to enforce a federal cause of action where its jurisdiction is "adequate and appropriate," this obligation does not derive from a congressional conferral of jurisdiction but from the Supremacy Clause itself. *Testa v. Katt*, 330 U.S. 386, 394 (1947); *see also* The Federalist No. 82, at 459 (Hamilton) (Isaac Kramnick ed., 1987). The Court has expressly rejected the contention that state courts adjudicating a federal claim "become courts of the United States, exercising a jurisdiction conferred by Congress." *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916). In *Bombolis*, the Court explained that its holdings that a state court with adequate jurisdiction must enforce a federal claim "in no sense implied that the duty which was declared to exist on the part of the state court depended upon the conception that, for the purpose of enforcing the right, the state court was to be treated as a Federal court, deriving its authority not from the state creating it, but from the United States." *Id.*

The Court recognized in *Bombolis* that the state courts derive their authority from state constitutions and state law. As Chief Justice Marshall explained almost two hundred years ago: "[t]he state courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this [C]ourt. . . . They

are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97 (1807); *see also* The Federalist No. 82, at 459 (in taking cognizance of cases arising under federal statutes, state courts would exercise "the judiciary power" of their own government).

As these cases demonstrate, Congress's authority to regulate the procedure in the federal courts is derived from its powers to create inferior federal courts and regulate their jurisdiction. Moreover, state courts are creations of separate and independent sovereigns. Article III therefore does not grant Congress the power to regulate the procedure in state courts. The state and federal governments are of "distinct and independent character . . . within their respective spheres of action." *Tarble's Case*, 80 U.S. (13 Wall.) 397, 407 (1871). "Each has its separate departments; each has its distinct laws, and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other." *Id.* at 406. As the Court further explained:

> In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other.

Id. at 407-08.

Thus, in *Mondou v. New York, N.H. & Hart. Ry. Co.*, 223 U.S. 1 (1912), which preceded *Testa* in holding that state courts with adequate jurisdiction must enforce a federal cause of action, the Court was careful "to observe that there is not here involved any attempt by Congress to enlarge or regulate the jurisdiction of state courts, *or to control or affect their modes of procedure*." *Id.* at 56 (emphasis added). The Court

further explained that the case involved "only [the] question of the duty of such a court, when its ordinary jurisdiction as prescribed by local laws is appropriate to the occasion and is invoked in conformity with those laws, to take cognizance of an action to enforce a right of civil recovery arising under the act of Congress and susceptible of adjudication according to the prevailing rules of procedure." *Id.* at 56-57. Moreover, in *Testa*, the Court noted the respondent's concession "that this same type of claim arising under Rhode Island law would be enforced by that State's courts" and that "[i]ts courts have enforced claims for double damages growing out of the Fair Labor Standards Act." 330 U.S. at 394.

True enough, subsequent cases establish that state courts must apply a federal procedure that is "part and parcel" of a federal cause of action. *See Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 363 (1952) (internal quotation and citation omitted). Furthermore, "where state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'" *Felder v. Casey*, 487 U.S. 131, 138 (1988) (quoting *Brown v. Western R.R. Co. of Ala.*, 338 U.S. 294, 296 (1949)).

Felder recognized, however, that "[*n*]*o one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts.*" 487 U.S. at 138 (emphasis added). As the Court earlier declared, "the procedure by which [state-created] rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control." *Hardware Dealers' Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931).

Procedural rules, of course, constitute the *lex fori*. And because "they are laws for administering justice," which is "one of the most sacred and important sovereign rights and duties[,] . . . a restriction" on a State's authority to control them would "materially affect both legislative and judicial

independence." *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 466 (1831); *cf. M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) at 327 (noting "the now well understood rights of nations to organize their judicial tribunals according to their notions of policy"). Unless a State's sovereignty over its judicial process is no more than an empty shell, the rules of procedure which a State adopts for administering its own laws cannot be revised by Congress in an exercise of Article III power.

Consistent with this understanding, the Court has long recognized that the federal judicial power is of limited scope. In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the Court repudiated *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), recognizing the "fallacy underlying" its rule that federal courts "need not, in matters of general jurisprudence, apply the unwritten law of the state as declared by its highest court" and "are free to exercise an independent judgment as to what the common law of the state is . . . ." 304 U.S. at 71, 79. *Erie*'s basis was the Constitution's limitations on federal power:

> Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. *Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or "general," be they commercial law or a part of the law of torts.* And no clause in the Constitution purports to confer such a power upon the federal courts.

304 U.S. at 78 (emphasis added).

As the foregoing demonstrates, the Constitution does not grant Congress a general supervisory authority over the state courts in the formulation of either common law or rules of procedure. Indeed, whenever a State does not recognize

tolling based on the filing of a claim in the courts of another sovereign, it is erroneous to suggest that section 1367(d), which orders a state court to hear a claim it otherwise would not, "demonstrate[s] a due respect for both federalism and the values it represents." Pet. Br. 7.[2] And where, as here, a litigant invokes section 1367(d) to override a State's policy regarding the conditions for suing a public entity, section 1367(d) is manifestly not a valid exercise of Congressional power.

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[2] Petitioner argues that section 1367(d) fosters federalism by encouraging federal district courts to dismiss supplemental state law claims which are more properly heard in the state courts and would be deemed untimely if re-filed in state court. *See* Pet. Br. 8-9. Petitioner further notes the various ad hoc approaches taken by federal courts in addressing the problem, such as conditioning dismissal on the defendant's waiver of a state law limitations defense or refusing to dismiss the case. *See id.* at 13-15. Petitioner argues that these solutions "were unduly complex and at odds with the principle of judicial economy, adding significant additional litigation time and effort." *Id.* at 16; *see also* U.S. Br. 22-23.

Neither petitioner nor the United States explains why petitioner could not have filed her suit in state court within the applicable limitations period after filing her federal court action and then moved the state court to stay proceedings pending resolution of her federal case. This simple and inexpensive expedient would obviate § 1367(d)'s intrusion on state sovereignty.

Such a protective action would have been particularly appropriate in this case, given the exacting standard for prevailing in a section 1983 action against a local government. When a county has a facially constitutional policy, a section 1983 plaintiff must meet the high evidentiary burden of showing either "deliberate indifference" or a "persistent and widespread practice" sufficient to support local government liability. Pet. App. 16a; *see also City of Canton v. Harris*, 489 U.S. 378, 396 (1989) (O'Connor, J., concurring in part and dissenting in part) ("the Court's opinion correctly requires a high degree of fault on the part of city officials before an omission that is not in itself unconstitutional can support liability as a municipal policy"). Prudence thus suggested that petitioner file her state and federal claims in both state and federal courts, and move to stay the state court action pending the resolution of federal court proceedings.

B. Section 1367(d) Exceeds Congress' Powers Under The Constitution

Section 1367(d) was enacted in 1990 as part of Congress's codification of the doctrines of pendant claim, pendent party, and ancillary jurisdiction into the doctrine of supplemental jurisdiction. *See* Charles A. Wright, *Law of Federal Courts* § 9, at 33-34 (5th ed. 1994). Section 1367(d) provides:

> The period of limitations for any claim asserted under [1367(a) supplemental jurisdiction], and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

Judicial Improvements Act of 1990, § 310(a), Pub. L. No. 101-650, 104 Stat. 5089, 5114 (1990) (codified at 28 U.S.C. § 1367(d)). The provision received little attention in Congress other than a cursory statement buried in a House Report that its

> purpose is to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the period of limitations while a supplemental claim was pending in federal courts. It also eliminates a possible disincentive [sic] from such a gap in tolling when a plaintiff might wish to seek voluntary dismissal of other claims in order to pursue an entire matter in state court when a federal court dismisses a supplemental claim.

H.R. Rep. No. 101-734, at 30 (1990), *reprinted at* 1990 U.S.C.C.A.N. 6860, 6876.

By its plain terms, section 1367(d) displaces state tolling laws and policies whenever a State does not give tolling effect to the filing of a suit in a court of another sovereign—so long, of course, as a plaintiff files first in federal court. The statute cannot be sustained as an exercise of either

Congress's express powers under Article I or its implied powers under Article III. Moreover, because the statute violates the Constitution's structural principles of federalism, it cannot be sustained under the Necessary and Proper Clause.[3]

1. Throughout the nation's history, Congress has enacted several laws tolling state statutes of limitations. *See* An Act In Relation To The Limitation Of Actions In Certain Cases, 13 Stat. 123 (1864); Transportation Act of 1920, § 206(f), 41 Stat. 462; 50 U.S.C. App. § 8(c) (Trading with the Enemy Act); 50 U.S.C. App. § 525 (Soldiers And Sailors' Civil Relief Act Of 1940). Each of these statutes, however, was enacted in response to such national emergencies as the Civil War and the First and Second World Wars. Article I explicitly grants Congress the power "[t]o declare [w]ar," "raise and support [a]rmies," "provide and maintain a [n]avy," "[t]o make [r]ules for the [g]overnment and [r]egulation of the land and naval [f]orces," and "[t]o provide for calling forth the [m]ilitia to execute the [l]aws of the Union, suppress [i]nsurrections and repel [i]nvasions." U.S. Const. Art. I, § 8, cls. 11-15.

As the Court observed in a challenge to the tolling provision enacted during the Civil War,

> The measures to be taken in carrying on war and to suppress insurrection are not defined. . . . [T]he power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power . . . to remedy the evils which have arisen from its

[3] Congress apparently modeled section 1367(d) after a proposal made by the American Law Institute. *See* Brian A. Beckcom, Note, *Pushing the Limits of Judicial Power: Tolling State Statutes of Limitations Under 28 U.S.C. § 1367(d)*, 77 Tex. L. Rev. 1049, 1058 (1999); *see also* The American Law Institute, *Study Of The Division Of Jurisdiction Between State And Federal Courts* § 1386(b) (1969). The supplemental jurisdiction statute has been the subject of controversy and criticism since its adoption in 1990. *See Raygor*, 534 U.S. at 549 & n.2 (Ginsburg, J., concurring in part and concurring in the judgment).

> rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections.

Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 506-07 (1871). Likewise, the tolling provision of the Soldiers and Sailors' Civil Relief Act, 50 U.S.C. App. § 525, which remains in effect, is fully within Congress's powers to provide for the armed forces and their governance. *See* U.S. Const. Art. I, § 8, cls. 12-14.[4] The existence of these extraordinary provisions thus provides no support for the enactment of section 1367(d), which is not an exercise of any of the foregoing Article I powers.[5]

Petitioner also erroneously invokes the automatic stay provision of the bankruptcy code, 11 U.S.C. § 362(a), to suggest that "[t]he Tenth Amendment concerns advanced by the [court below] cast constitutional doubt on the validity" of the bankruptcy statute. Pet. Br. 21. The argument is unpersuasive for two reasons. First, in forming the Union, the States expressly delegated to the Federal Government the power "[t]o establish . . . uniform [l]aws on the subject of [b]ankruptcies throughout the United States." U.S. Const. Art. I, § 8, cl. 4. The provision thus does not implicate Tenth Amendment concerns.

Second, South Carolina's limitations law expressly tolls any South Carolina statute of limitations "[w]hen the com-

[4] While the tolling provision of the Transportation Act of 1920 was not enacted until after the conclusion of World War I, that provision addressed the effect to be given to the Federal Government's control of the railroads during wartime and was upheld as "a war measure." *Wenatchee Produce Co. v. Great Northern Ry. Co.*, 271 F. 784, 784 (E.D. Wash. 1921).

[5] *Amici* acknowledge that the Y2K Act tolled state statutes of limitations during the statutorily prescribed pre-litigation "notice and remediation period." 15 U.S.C. § 6606(e)(4). Congress enacted the provision pursuant to the Commerce Clause. *See* 15 U.S.C. § 6601(b).

mencement of an action shall be stayed by injunction or statutory prohibition." S.C. Code Ann. § 15-3-100. Such tolling remains in effect for "the time of the continuance of the injunction or prohibition." *Id.* This provision would clearly apply to a litigant who is prohibited from filing a state law claim by operation of the bankruptcy code's automatic stay. Here, unlike in a bankruptcy proceeding, there was no injunction or statutory prohibition that prevented petitioner from filing a parallel suit in state court while her § 1983 action was pending in federal court.[6]

2. Petitioner adopts the ALI's view that section 1367(d) is a valid exercise of Congress's powers under Article III. *See* Pet. Br. 9-10; 18-29. For example, petitioner invokes the Anti-Injunction Act, 28 U.S.C. § 2283, and the All Writs Act, 28 U.S.C. § 1651(a), contending that section 1367(d) "utilize[s] the same constitutional authority" and that "[l]ike them, § 1367(d) is a necessary aid to jurisdiction." Pet. Br. 21.

Petitioner quotes in part from the ALI's conclusory assertion (predicated on the assumption that a federal forum is invariably preferable to a state forum) that "[i]t is plainly appropriate, 'as an aid to the exercise of federal jurisdiction, to see to it that a plaintiff is not discouraged from seeking a federal forum if he believes that such a forum is available.'

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[6] Petitioner also relies on *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1867), as support for the contention "that the judicial power extends to tolling the limitations period where justice would otherwise be denied." Pet. Br. 39. In *Hanger*, the Court held that the Civil War had tolled a lawsuit brought by citizens of New Hampshire against a citizen of Arkansas, a State that had joined the rebellion. *See* 73 U.S. (6 Wall.) at 534, 539-42. The *Hanger* Court specifically observed that under the law of nations there is a "[t]otal inability on the part of an enemy creditor to sustain any contract in the tribunals of the other belligerent. . . during war, but the restoration of peace removes the disability, and opens the doors of the courts." *Id.* at 539. In contrast, the courts of South Carolina were open to petitioner for "two years after [her] loss was or should have been discovered." S.C. Code Ann. § 15-78-110.

One way to achieve this goal is to assure him that he will not lose his cause of action if his belief turns out to be erroneous." ALI, *Study of The Division Of Jurisdiction*, 453-54, *quoted in* Pet. Br. 10.

Section 1367(d) may be "[o]ne way" of legislating, but overriding a State's tolling policy—and especially a State's policy regarding the conditions for suing an entity endowed with sovereign immunity, which is a jurisdictional limitation—is not a constitutionally proper "aid of the [federal] judicial power." ALI Study at 455. Indeed, it is a considerable expansion beyond the traditional understanding of a federal court's authority to issue orders "necessary in aid of its jurisdiction." 28 U.S.C. § 2283 (Anti-Injunction Act); *see also* 28 U.S.C. § 1651 (All Writs Act); *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970) (interpreting Anti-Injunction Act).

In *Atlantic Coast Line*, the Court held that a federal court had improperly enjoined a railroad from invoking a state court injunction in a labor dispute. The Court stated that Congress's purpose in enacting the Anti-Injunction Act was to "direct[] that state courts shall remain free from interference by federal courts," 398 U.S. at 282, a purpose wholly at odds with petitioner's position. The Court held that "a federal court does not have inherent power to ignore the limitations of § 2283 and to enjoin state court proceedings merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear." *Id.* at 294. "This rule applies regardless of whether the federal court itself has jurisdiction over the controversy. . . ." *Id.*[7]

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[7] Petitioner errs in asserting that the ruling below "raises serious issues about a federal court's authority to stay state proceedings as a matter of inherent judicial power." Pet. Br. 23. *Atlantic Coast Line* makes clear that there is no such power but only that which is granted in the Anti-Injunction Act. *See* 398 U.S. at 286-87 (rejecting argument that § 2283

The Court further observed that § 2283's exception authorizing an injunction when "necessary in aid of" a federal court's jurisdiction requires far more than showing "that the requested injunction is related to that jurisdiction." *Id.* at 295. Rather, "it implies something similar to the concept of injunctions to 'protect or effectuate' judgments." *Id.* The Court concluded that these exceptions "imply that some federal injunctive relief may be necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case." *Id.*

Thus, in *Atlantic Coast Line*, the Court vacated a federal district court's injunction against enforcement of a pre-existing state court injunction, rejecting, *inter alia*, the argument that the district court's injunction was "necessary in aid of" its jurisdiction and noting that "no such situation is presented here." *Id.* at 295. As the Court explained, "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." *Id. Cf. Kline v. Burke Constr. Co.*, 260 U.S. 226, 230 (1922) (When a dispute is over personal liability and "does not involve the possession or control of a thing, . . . an action brought to enforce such a liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court.").

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only establishes a non-binding rule of comity). For all of petitioner's extensive discussion of the "unitary system of justice in the enforcement of federal interests," *see, e.g.*, Pet. Br. 33, petitioner ignores that this system clearly contemplates that state courts have authority to adjudicate federal claims and are typically free to do so. *See Atlantic Coast Line*, 398 U.S. at 294-95.

As the foregoing demonstrates, section 1367(d) is in no sense "a necessary aid to [federal] jurisdiction." Pet. Br. 21. The rule does not even apply until a federal court dismisses the claim brought under section 1367(a) and thus *declines* jurisdiction. *See* 28 U.S.C. § 1367(d). Such a dismissal is without prejudice and is not a judgment on the merits. *See* Fed. R. Civ. P. 41(a); Pet. App. 22a (Dist. Ct. Order). The tolling provision thus cannot be analogized to an injunction or order issued "to 'protect or effectuate' judgments." *Atlantic Coast Line*, 398 U.S. at 295. Indeed, the South Carolina Supreme Court's holding—which was rendered four and a half years after the federal district court dismissed petitioner's case—did not in any way interfere with the federal court's authority to decide her case. *See id.*

Moreover, contrary to the views of petitioner and the ALI, multiple lines of authority establish the core proposition that with respect to state-created causes of action, the power to "prescrib[e] the time within which suits shall be litigated in their Courts" is a fundamental and historic attribute of the States' sovereignty that Congress cannot override in an exercise of Article III power. *M'Elmoyle*, 38 U.S. (13 Pet.) at 327. These authorities are the Court's Full Faith and Credit Clause jurisprudence and the *Erie* line of cases.

3. The Court's Full Faith and Credit Clause jurisprudence has long recognized a forum State's authority to determine whether a case has been brought in a sufficiently timely fashion so as to warrant access to its courts to enforce the underlying right. In *Hawkins*, the Court observed that "[i]t is not to be questioned, that laws limiting the time of bringing suit, constitute a part of the lex fori of every country: they are laws for administering justice; one of the most sacred and important of sovereign rights and duties; and a restriction which must materially affect both legislative and judicial

independence." 30 U.S. (5 Pet.) at 466. And in *M'Elmoyle* the Court explained that:

> It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits shall be litigated in their Courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred, has been, from a remote antiquity, fixed by every nation, in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction.

38 U.S. (13 Pet.) at 327. The *M'Elmoyle* Court further observed that "there is no direct constitutional inhibition upon the states, nor any clause in the Constitution from which it can be even plausibly inferred, that the states may not legislate upon the remedy in suits upon the judgments of other states, exclusive of all interference with their merits." *Id.* at 328.

Thus for nearly two centuries it has been established that "'[t]he period sufficient to constitute a bar to the litigation of stale demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience.'" 2 J. Kent, *Commentaries on American Law* 462-63 (2d ed. 1832) (quoted in *Sun Oil Co. v. Wortman*, 486 U.S. at 726). Consistent with these principles, the Court has long recognized the power of a State to control access to its judicial forums by applying its own statutes of limitations "even when the substance of the claim must be governed by another State's law." *Sun Oil*, 486 U.S. at 723. Accordingly, under the Full Faith and Credit Clause, a forum State has the right to apply its own statute of limitations to bar an action even if the State which created the right would allow it. *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953).

This rule is based on the recognition that a State's authority to control the agenda in its courts is a fundamental attribute of its sovereignty. As the *Sun Oil* Court explained: "[a] State's interest in regulating the workload of its courts . . . certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations." 486 U.S. at 730. And while the Full Faith and Credit Clause only addresses State to State relations, *Tarble's Case* makes clear that as between the state and Federal sovereigns, the "mode of enforcement" that either a federal or state sovereign adopts for its "distinct laws," is a "matter[] subject to [its] own control, and in the regulation of which neither can interfere with the other." 80 U.S. (13 Wall.) at 406-08.

Petitioner thus errs in contending that "[b]ecause the Constitution anticipates a unitary system of justice in the enforcement of federal interests and supplemental claims that are joined with federal ones comprise but a single 'constitutional case,' . . . it . . . follows that Congress may require state courts to hear those claims that have been divorced from the federal ones that impart original jurisdiction in the federal courts." Pet. Br. 33 (internal quotations and citation omitted). To the contrary, while state courts have a duty to apply federal law under the Supremacy Clause, Congress can neither confer jurisdiction on a state court nor rewrite its procedural rules. *See* discussion *supra* at 9-13; *see also Atlantic Coast Line*, 398 U.S. at 285-86. While the decisions of state courts on federal questions are ultimately reviewable by this Court, state courts are not "inferior courts" within the meaning of Article III. *See id.* at 295-96; *Ex parte Bollman*, 8 U.S. (4 Cranch) at 97. As the Court recently explained, state courts are courts of a co-sovereign and are "'no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Alden v. Maine*, 527 U.S. 706, 714 (1999) (quoting The Federalist No. 39, p. 245 (C. Rossiter ed., 1961) (J. Madison)).

4. While the *Erie* line of cases has the specific purpose of determining what law must be applied when a state claim is adjudicated in federal court, it likewise manifests limits on the federal judicial power which prohibit the application of section 1367(d) to preserve petitioner's state law claims in this case. As the Court recognized in *Erie*, "Congress has no power to declare substantive rules of common law applicable in a state whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts." 304 U.S. at 78.[8]

The Court's cases applying the *Erie* rule conclusively establish that the federal courts must apply state statutes of limitations and tolling rules to a state law claim. The Court's cases likewise establish that Congress's implied powers under Article III to regulate the procedure in the federal courts do not include the intrusive power to displace state statutes of limitations and tolling rules which apply in the State's own courts.

In *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 108-09 (1945), the Court held that "if a plea of the statute of limitations would bar recovery in a State court, a federal court ought not to afford recovery." 326 U.S. at 110. The Court further explained that:

> The source of substantive rights enforced by a federal court under diversity jurisdiction . . . is the law of the States. Whenever that law is authoritatively declared by a State, whether its voice be the legislature or its highest court, such law ought to govern in litigation founded on that law, whether the forum of application is a State or a

[8] The *Erie* rule that "the law to be applied in any [diversity] case is the law of the state," 304 U.S. at 78, applies as well to state claims brought in federal court under supplemental jurisdiction. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966).

> federal court and whether the remedies be sought at law or may be had in equity.

Id. at 112.

The issue of tolling is, of course, "closely related" to "the length of the limitations period." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). Following *Guaranty Trust*, the Court held that *Erie* requires that a federal court apply state tolling rules to a state tort claim. *See Ragan v. Merchants Transfer & Warehouse Co., Inc.*, 337 U.S. 530, 533-34 (1949). Thus, in *Ragan*, the Court rejected the argument that the filing of a complaint in the federal district court under Fed. R. Civ. P. 3 tolled a state statute of limitations when actual service was not effected until several months following the running of the limitations period, and under state law "the requirement of service of summons within the statutory period was an integral part of [the] statute of limitations." *Id.* at 532.

The Court held that the suit was barred. While acknowledging that "the suit was properly commenced in the federal court" under the federal rules, the Court reasoned that because the "cause of action is created by local law, the measure of it is to be found only in local law . . . It accrues and comes to an end when local law so declares." *Id.* at 533.

Thirty years later the Court expressly re-affirmed *Ragan*'s holding that a federal court must apply state tolling rules in a lawsuit based on a state cause of action. *See Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980). The Court rejected the argument that *Hanna v. Plumer*, 380 U.S. 460 (1965), had overturned *Ragan* and thus required that Fed. R. Civ. P. 3 be applied to displace Oklahoma's statutory requirement that actual service was required to toll the statute of limitations. *See* 446 U.S. at 749-51. The Court explained that that "[t]here is no indication that the Rule was intended to toll a state statute of limitations, much less that it purported to displace state tolling rules for purposes of state statutes of limitations." *Id.* at 750-51. "In contrast," Oklahoma's statute

"is a statement of a substantive decision by that State that actual service on, and accordingly actual notice by, the defendant is an integral part of the several policies served by the statute of limitations[,]" which "must be considered part and parcel of the statute of limitations." *Id.* at 751-52. The Court held that as there was "no direct conflict between the Federal Rule and the state law, the *Hanna* analysis does not apply." *Id.* at 752.

Hanna held that a federal rule of civil procedure prevails in a direct conflict with relevant state law. But the federal rules of civil procedure apply only to proceedings brought "in the United States district courts." Fed. R. Civ. P. 1. *Hanna* further recognized that "*neither Congress nor the federal courts* can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution [as] in such areas state law must govern because there can be no other law." 380 U.S. at 471-72 (emphasis added).

"[T]he constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading *in those courts*," *id.* at 472, and "to prescribe housekeeping rules *for federal courts* even though some of those rules will inevitably differ from comparable state rules." *Id.* at 473 (emphasis added). *Hanna*, however, does not support the conclusion that section 1367(d) is a valid exercise of Congress's Article III powers.[9] Indeed, *Hanna* does no more than recognize the traditional principle of conflicts that the forum is entitled to apply its own rules of procedure even when the substance of a claim is governed by another sovereign's law.

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[9] The *Hanna* analysis also applies to congressional enactments governing procedure in the federal courts. *See Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 26-27 (1988).

Section 1367(d) is not simply a rule of federal court procedure. While section 1367(d) tolls a state law claim during its pendency in the federal district court, its goes even further. By its plain terms it tolls a state law claim "for a period of 30 days after it is dismissed" by a federal court. It does so for the purpose of allowing plaintiffs who brought suit in federal court to refile their claims in state court notwithstanding the State's legitimate policy to not allow any case filed in another sovereign's courts to be refiled in its own courts after the expiration of the limitations period. *See* H.R. Rep. No. 101-734, at 30; 1990 U.S.C.C.A.N. at 6876. Section 1367(d) thus governs "practice and pleading in" the state courts, *Hanna*, 380 U.S. at 472, and exceeds the bounds of Congress's Article III power.

Moreover, where as here, a state statute creates a legal right that did not exist at common law and makes timely filing of a suit an essential element of the right, the limitation policy is in every sense "part and parcel" of the right itself. *Walker*, 446 U.S. at 752. Petitioner's contention that Congress has power under Article III to override South Carolina's legislative scheme for suing governmental entities in state court for money damages thus goes well beyond any bona fide regulation of the federal courts' jurisdiction and procedure. It impermissibly usurps a State's sovereign authority to create a legal right and make fundamental policy choices regarding the conditions for enforcing the right. Section 1367(d) thus manifestly does not "foster[] a greater adherence to the key values of federalism." Pet. Br. 17.

5. Petitioner further asserts that South Carolina's non-tolling policy violates the Supremacy Clause because it "will frequently and predictably produce different outcomes . . . [based] solely on whether the claim is [heard] in state or federal court." Pet. Br. 27-28 (quoting *Felder v. Casey*, 487 U.S. at 138). Petitioner's reliance on *Felder* is misplaced because section 1367(d) does not provide a "federal remedy."

Id. at 28. At most it provides a procedural right which must give way to a State's legislative and judicial determinations for litigating state law claims in the State's courts.

As recognized above, the Supremacy Clause requires a state court to hear a federal claim when it has "adequate and appropriate" jurisdiction over an analogous state claim. *See Testa*, 330 U.S. at 394. And a state court adjudicating a federal claim is required to apply federal procedures that are part of the federal scheme. *See Felder*, 487 U.S. at 153. But the *Felder* Court also recognized that "[n]o one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts." 487 U.S. at 138. *See also Hardware Dealers*, 284 U.S. at 158 ("the procedure by which rights may be enforced and wrongs remedied is peculiarly a subject of state regulation and control"). South Carolina's non-tolling policy does not violate the *Testa* rule because the State itself is the source of the right.

The courts are one of the principal institutions through which the State's legislative and enforcement priorities are carried out. Statutes of limitations are one of the primary means by which a State controls the workload of its courts and prioritizes the enforcement of state-created rights. *See Sun Oil,* 486 U.S. at 730. State-created rights could become illusory if the State's courts are clogged with stale claims, thus preventing the expeditious rendering of justice. *See Sun Oil*, 486 U.S. at 726 (quoting *Kent's Commentaries*, at 462-63) ("'The period sufficient to constitute a bar to the litigation of sta[l]e demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience.'")

Petitioner ignores that the States' use of statutes of limitation to set the agenda for their own courts is both a historic and fundamental attribute of their sovereignty. She instead relies on several cases involving federal statutory rights to contend that notice to defendants is the only legitimate purpose of a statute of limitations, *see* Pet. Br. 36-40, and that "[t]olling works no prejudice to State interests." *Id.* at 41. Petitioners authorities are, however, inapposite.

Contrary to petitioner's assertion, *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944), does not present "a strikingly similar fact pattern" to this case. Pet. Br. 36. Rather, *Telegraphers* involved a federal court action to enforce a federal statutory right. *See* 321 U.S. at 347-48. In *Telegraphers*, the Court held that a state statute of limitations relied upon by the employer was inapplicable, that the federal claim was governed by a two-year federal statute of limitations, and that the federal court action had been commenced with that two-year period. *Id.* at 348-49. Just as "[i]t is difficult to see how state statutes of limitations can restrict the power of the federal administrative tribunal to consider and adjust claims," *id.* at 348, it is equally difficult to see how Congress can order a state court to hear a state law claim which its own legislature has prohibited it from adjudicating.

Burnett likewise is readily distinguishable. That case, too, involved a federal cause of action (the Federal Employers' Liability Act, 45 U.S.C. §§ 51 *et seq.*), which contains a specific statute of limitations, 45 U.S.C. § 56, but is silent as to tolling. *See* 380 U.S. at 424-25. As the Court explained, "[t]he basic question" of whether "a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.'" *Id.* at 426 (quoting *Midstate Horticultural Co. v. Pennsylvania R.R. Co.*, 320 U.S. 356, 360 (1943)).

Although the *Burnett* Court held that filing a state court action had tolled the limitations period, it did so to effectuate Congress's intent that FELA have "a uniform operation." *Id.* at 433 (citation and internal quotation omitted). The case thus does not support petitioner's broad assertion "that the judicial power extends to tolling the limitations period where justice would otherwise be denied." Pet. Br. 39. While it is

this Court's role to interpret federal law and determine the purposes of the limitations period of a federal cause of action, it is likewise the South Carolina Supreme Court's role to interpret South Carolina law and determine whether tolling is consistent with its legislature's intent in creating a cause of action.

6. Petitioner further argues that the holding below discriminates against a federal right. *See* Pet. Br. 41-47. Petitioner asserts that the South Carolina "limitations period . . . penalizes her with forfeiture of her state law claims for having pursued them in federal court." *Id.* at 42. Petitioner further contends that the "[r]emoving the tolling provision from the statute results in a denial of due process by preventing the plaintiff from ever making her case before a court," *id.* at 43, and that South Carolina cannot enforce its limitations policy because it discriminates against her federal right. *See id.* at 44 (citing *Testa* and *Dice*).

Petitioner, however, can make no showing that South Carolina's non-tolling policy singles out for discriminatory treatment those litigants who file in federal court. Rather, the State's policy is a neutral rule, which applies whether a litigant pursues a claim in the courts of another State, a foreign country, or the United States. Moreover, petitioner could have filed a protective action in state court at any time prior to the expiration of the applicable two-year statute of limitations. *See* S.C. Code Ann. § 15-78-100(a). Thus, to the extent *Testa*'s non-discrimination principle applies to a state court litigant who previously sought redress in a federal forum, petitioner has not established that South Carolina's courts have discriminated against her because she exercised a federal right.

CONCLUSION

The judgment of the Supreme Court of South Carolina should be affirmed.

Respectfully submitted,

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